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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 611

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PENNSYLVANIA WATER AND POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 3, 1952 (R. 250). This decision affirmed a *summary* declaratory judgment of the United States District Court for the District of Maryland entered on May 21, 1951 (R. 1-2), declaring invalid on its face, upon motion for summary judgment of respondent, Pennsylvania Water

and Power Company (Penn Water), a certain long term contract for the sale by Safe Harbor Water Power Corporation (Safe Harbor) of its entire output of hydroelectric energy at wholesale in interstate commerce to Penn Water and Consolidated, which were the creators of Safe Harbor. This contract, consisting of the original agreement of the parties dated June 1, 1931, and two supplements thereto entered into respectively on August 1, 1932, and November 22, 1939, will be referred to herein as the "Safe Harbor Agreement". It is set forth in the Record at pages 91-112.

The contract thus summarily invalidated is the identical contract, which, after lengthy hearing, was modified as to rates by the Federal Power Commission and, as modified, approved and ordered filed in its entirety as Safe Harbor's tariff governing its interstate rates and services, by the order of the Federal Power Commission dated November 4, 1946, (5 F. P. C. 221), affirmed by the Third Circuit in 179 F. 2d 179 (1949) cert. den. 339 U. S. 957. It is one of two separate contracts, the invalidation of which was alleged by Penn Water as a basis for its application to this Court for certiorari in *Pennsylvania Water and Power Co. et al. v. Federal Power Commission et al.*, a decision of the District of Columbia Circuit dated July 3, 1951, certiorari to review which was granted February 4, 1952.

Consolidated, a "public utility" under the Federal Power Act operating solely in Maryland, is the supplier of electric energy to the consuming public in the Baltimore Metropolitan Area. It is also a major participant with Penn Water and Safe Harbor, two electric generating companies with federally licensed plants in Pennsylvania on the Susquehanna River, the operations of both of which are confined to the State of Pennsylvania, in contributing to an interstate integrated power pool fully regulated by the Federal Power Commission. The Federal Power Commission has thoroughly investigated, approved and highly praised this pool (including the contractual arrangement creating and supporting it) for its efficient, economical,

carefully worked out and long tested utilization of firm steam generated energy and fluctuating hydro energy derived from the highly variable waterpower of the Susquehanna River.[1] Other beneficiaries of this interstate power pool, by virtue of which energy flows back and forth without regard to state lines in accordance with the economic and practical exigencies of the moment, include the Pennsylvania Railroad (for the operation of its electrified lines), Metropolitan Edison Company in Pennsylvania, Philadelphia Electric Company in Pennsylvania, Pennsylvania Power and Light Company in Pennsylvania, and Potomac Electric Power Company in Washington, D. C.

This power pool is founded primarily upon the extensive steam generating plants of Consolidated, the hydroelectric and steam generating plants of Penn Water, the hydroelectric plant of Safe Harbor, and the transmission lines owned by Penn Water and Penn Water's wholly owned Maryland subsidiary which interconnect the energy resources of Penn Water, Safe Harbor, Consolidated and Potomac Electric Power Company.

Safe Harbor was created by Penn Water and Consolidated as an additional long-term source of hydroelectric energy for them and for this power pool; and, by the Safe Harbor Agreement, Penn Water and Consolidated supplied Safe Harbor's entire equity capital, guaranteed its entire funded debt, and bound themselves to receive all its output and to pay all of its operating expenses and taxes plus a regulated fair return on its plant investment. Since the execution of the Safe Harbor Agreement on June 1, 1931, Consolidated and Penn Water have been (and are

[1] This cooperative arrangement and pool are objectives of the policy of Congress expressed in the Federal Power Act (U. S. C. A. Title 16, Secs. 791-824h). Section 824a(a) of that Title places a duty on the Federal Power Commission to "promote and encourage" the "inter-connection and coordination" of electric facilities within and between regional districts.

today), as the Court of Appeals found, Safe Harbor's sole stockholders and sole customers (R. 39-47, 139-140). Though made a defendant in this action, Safe Harbor, in view of the parental relationship of Consolidated and Penn Water, filed a non-committal answer to the complaint and took no further part in the proceedings.

From the standpoints of the public interest, the Public Service Commission of Maryland's guardianship of the consumers of the Baltimore Metropolitan Area, the large utility beneficiaries of the power pool in question, the impact of the Sherman Act, the objectives of the Federal Power Act, the jurisdiction of the Federal Power Commission and the effect of its approval of the pool and of the Safe Harbor Agreement, and the jurisdiction of the Pennsylvania Public Utility Commission, this case is directly related to the conflicting cases of *Pennsylvania Water and Power Company* v. *Federal Power Commission,* and *Pennsylvania Public Utility Commission v. Federal Power Commission,* Nos. 428 and 429, in which certiorari was granted on February 4, 1952, and in which Consolidated is an Intervenor-Respondent.

OPINIONS BELOW

The opinion of the District Court (R. 3-9) is reported in 97 F. Supp. 952. The opinion of the Court of Appeals has not yet been reported but will be found at page 231 of the Record.

JURISDICTION

Jurisdiction to issue the writ of certiorari requested is conferred by U. S. C. Title 28, Secs. 1254 and 2101. The judgment and opinion of the Court of Appeals was filed January 3, 1952, and this petition is filed within the period of ninety days thereafter.

STATEMENT OF THE MATTER INVOLVED

In this summary judgment proceeding, the record facts herein set forth *must be taken as true,* because on the face of the pleadings and affidavits they are (a) undisputed or (b) to the extent disputed, alleged by petitioner. The lower Courts, however, committed the fundamental error of disregarding many of these material facts and, in violation of Rule 56 of the Federal Rules of Civil Procedure, resolving others, though disputed, against petitioner.

(a) *The Holdings of the Lower Courts*

Solely by reason of *four* separable provisions contained in Articles III(a), IV (last sentence) and XIV of the Safe Harbor Agreement (R. 95, 96-7, 105), which are set out below at pages 11-12 of this petition, and which the lower Courts patently misconstrued, the District Court held that the entire Safe Harbor Agreement was:

> (1) *per se* in violation of the Sherman Act, although none of its provisions effected price-fixing, monopoly, boycott or exclusion of competitors from a market, which are the only restraints which this Court, thus far, has held not to be subject to the factual Rule of Reason criteria;
>
> (2) in violation of a statute of Pennsylvania,[2] although the Safe Harbor Agreement did not constitute any transfer of Safe Harbor's powers, franchises or

[2] This statute is Article III, Sec. 3, of the Public Service Company Law of Pennsylvania, in force when the Safe Harbor Agreement was executed. It provided:

"Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful * * *.

"(c) For any public service company to sell, assign, transfer, lease, consolidate or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

privileges within the proper meaning of that state statute, although petitioner had tendered the factual issue that the Pennsylvania Public Service Commission had approved the Safe Harbor Agreement, and although the state statute has been rendered, by Sec. 8 of the Federal Power Act (U. S. C. A. Title 16, Sec. 801), constitutionally inapplicable to Safe Harbor, a 'licensee'' and ''public utility'' under the Federal Power Act, to its interstate wholesale contract, and to any transfer of its rights and franchises as a licensee; and

(3) in violation of the common law and public policy of Pennsylvania, although the Safe Harbor Agreement must be judged exclusively in the light of paramount federal law, and in any event, did not effect surrender to others of any initiative or freedom of Safe Harbor as a public utility, or of its directors, to expand its plant (if permitted by the Federal Power Commission), to make all proper agreements with any one, or to apply to any governmental agency having jurisdiction to regulate its powers, rates or services.

These *four* provisions of the Agreement, which were the only ones found objectionable, were minor and unimportant ones, which have never, in over 20 years during which the Safe Harbor Agreement has operated, had any practical effect. Nothing has happened in over 20 years to call into operation any of these four provisions and during that period they have not influenced the production or disposition of one kwh. of electric energy. During that same period the admittedly legal features of the Agreement have independently governed the *complete* production, sale and delivery of over 16 billion kwh. of energy. The four provisions which the lower Courts held made the entire Safe Harbor Agreement illegal *per se* should have been found completely separable from the rest of the Agreement.

The Court of Appeals also reached the conclusion that the Safe Harbor Agreement was *per se* violative of the Sherman Act for an additional reason, namely, its alleged "close connection" with a separate contemporaneous agreement between Penn Water and Consolidated which related solely to the sale of certain electric energy belonging to Penn Water and Consolidated, and to which Safe Harbor was not a party. This last mentioned agreement, which is referred to as the "Penn Water Contract", had been earlier held invalid on its face by the Fourth Circuit as *per se* violative of the Sherman Act and as violative of the laws of Pennsylvania, because it contained certain provisions applicable to Penn Water's activities, which provisions do not appear in the Safe Harbor Agreement and which are completely different from Articles III(a), IV (last sentence) and XIV of the Safe Harbor Agreement. See *Pennsylvania Water & Power Co., et al. v. Consolidated Gas Electric Light and Power Co., et al.*, 184 F. 2d 552 (1950) cert. den. 340 U. S. 906, a decision which we believe to be unsound and erroneous even if limited to its particular facts, but, in any event, completely distinguishable from the present case.

The Court of Appeals attempted to connect the Safe Harbor Agreement to the separate and distinct Penn Water Contract, but failed to find any illegality in the connection between the two. It therefore merely *imputed* the illegality which it had purported to find in certain specific provisions of the Penn Water Contract to the separable Safe Harbor Agreement. It found that both agreements were the implementations of "purposes they [the parties] desired to accomplish by joint action" (R. 237), namely, an interstate power pool. But there was no finding either in the present case or in the *Penn Water* case that such underlying cooperative pooling purpose was illegal. There were no facts whatever in the Record from which such a finding could be made. On the contrary, the uncontradicted facts on this point set forth in an affidavit filed by Consolidated

were that the Safe Harbor Agreement "was not made for the purpose of stifling Safe Harbor's competition, but was made as a necessary prerequisite to the establishment, financing and construction of the Safe Harbor project and to provide an additional source of power for Penn Water and Consolidated" (R. 124, 126).[3] Thus, there is here no

[3] The absence of an illegal purpose is an important circumstance in this case for two reasons. First, it has always been recognized that, although an innocent purpose will not save from legal condemnation an agreement which, in fact, effects an unreasonable restraint, good purpose and intent are relevant and material upon the question whether a contract does bring about a restraint that is forbidden. Second, the absence of any illegal purpose in creating the pool and in separately making the Penn Water Contract and the Safe Harbor Agreement destroys the soundness of the holding that one agreement must fall simply because the other contained provisions peculiar to it which may have had an illegal effect.

The lower courts in both the *Penn Water* case and in the present case assumed the lawful intent and purpose of the parties in making both contracts, and both contracts were held illegal solely because of the effect of particular provisions which they severally contained.

Thus, the District Court in the present case expressly held the Safe Harbor Agreement invalid "irrespective of the pure intention or good faith of the parties" (R. 9; 97 F. Supp. 952 at 956); and the Court of Appeals quite properly praised the underlying cooperative purpose and intent behind the Safe Harbor Agreement that it should be an instrumentality of the interstate power pool, as follows (R. 241):

> "* * * the facts tend to show that *some cooperation* between Safe Harbor and other electric utilities is essential to its greatest economic development and success. Safe Harbor is *limited* by its Pennsylvania charter and certificate of public convenience to the *hydro* electric development and sale of electric power; and the scope of its operations is *limited* by the capacity of its power site and the flow of the river. Its output is therefore *not uniform and dependable* and it must market its product to a utility or utilities possessed of facilities for the production of steam generated electric

holding that the Safe Harbor Agreement was part of, or the means of effectuating, any underlying illegal conspiracy or combination. By the "illegal plan" of which the Court of Appeals states the Safe Harbor Agreement was a part (R. 237), the Court necessarily meant that the Safe Harbor Agreement was part of the Penn Water Contract. But such conclusion flies directly in the face of the record facts.

(b) *The Terms, Interpretation and Effect of the Safe Harbor Agreement.*

The Safe Harbor Agreement (R. 91-112), by its salient terms, provides:

1. for the necessary financing of a *wholly new* project, to be constructed and operated by Safe Harbor, a subsidiary corporation to be wholly owned jointly by Penn Water and Consolidated (Penn Water to contribute one-third of its equity capital and to own one-half of its voting stock, and Consolidated to contribute two-thirds of its

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energy which can be economically utilized with that of Safe Harbor. The aggregate loads must be large enough to absorb Safe Harbor's output in low water periods to supplement the output of steam generated energy during peaking periods of demand; and also to absorb Safe Harbor's output in high flow periods when it can be used as a substitute for steam generated energy at a reduced cost. The sale of the entire output of Safe Harbor to other members of the pool at a fair price *ensures an economic use of the available product* and a fair return on the investment, and *the resulting economies may be reflected in lower rates to consumers.* The Commission is of opinion that Safe Harbor *must become a member of such a power pool in order to utilize and to expand its facilities to its best advantage;* and that the integrated and interconnected interstate system, composed of Safe Harbor and its two customers, Penn Water and Consolidated, is such a pool; * * *.

"That the plan established by Penn Water and Consolidated is operative cannot be doubted *since the experience of twenty years shows that it is practicable and successful,* * * *". [Emphasis supplied.]

equity capital and own one-half of its voting stock and an equivalent amount of its non-voting stock);

2. for the sale until 1980 of Safe Harbor's entire output of its initial seven-generator plant (except such as might be required for the performance of any duty imposed upon Safe Harbor by its charter or otherwise by law) to its two owners equitably in the same ratio as their respective stockownerships (i. e., one-third thereof to Penn Water and two-thirds thereof to Consolidated) (Art. II);

3. for the transmission and delivery by Penn Water, over its transmission lines, to Penn Water and Consolidated of the energy respectively purchased by them from Safe Harbor (Art. VII);

4. for the payment by Penn Water and Consolidated to Safe Harbor of rates for this purchased energy, in stated dollar amounts for each of the years through 1937, and thereafter in amounts sufficient to yield Safe Harbor a net return of 7% on its investment, subject, however, to changes in such rates by orders of any governmental regulatory authorities having jurisdiction (Art. V);

5. for cooperation and coordination of the parties in the joint use of their facilities, in their investments in additional facilities and in the conduct of their several operations, in order to encourage maximum economy and efficiency in the interchange of energy (Art. IV);

6. for arbitration of any disputes which might arise between the parties to the agreement, which arbitration any one of the parties, including Safe Harbor, could freely and independently invoke (Art. XV).

None of the foregoing contractual provisions were found illegal in and of themselves by the lower Courts in the present case. On the contrary, the lower Courts characterized the respective contractual shares of Penn Water and Consolidated in Safe Harbor's output as the "rightful entitlement" of each of them.

The Agreement also contained the following minor and separable provisions set forth in Arts. III(a), IV (last sentence) and XIV thereof (R. 95, 97, 105). It was these provisions which the lower Courts in this case held to be illegal, and by reason of which summarily adjudged the entire Safe Harbor Agreement to be illegal *per se* on its face. Holtwood Company is Penn Water; Baltimore Company is Consolidated:

"ARTICLE III

"*Other Entitlements*

"(a) At the request and for the benefit of either Baltimore Company or Holtwood Company, Safe Harbor Company shall install additional machinery or equipment, not included in the initial development, subject to the stipulation in the last paragraph of Article V*, provided such request is submitted in writing to Safe Harbor Company at least eighteen months before the date when the facilities are to be completed, and that the arrangement is approved by the receiving company which is not making the request. Furthermore, Safe Harbor Company will not contract to supply power and energy (except any which may be required for the performance of any duty or obligation to serve imposed on it by its charter or otherwise by law) from additions to its plant to any party other than Baltimore Company and Holtwood Company without the written consent of both Baltimore Company and Holtwood Company.

* * * * * * * *

"ARTICLE IV

"*Co-ordination and Joint Use of Facilities*

"* * * For this purpose Safe Harbor Company will not enter into other agreements with either receiving

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* Relating to payment therefor.

company without the approval of the other, and will take into consideration either receiving company's suggestions for the best co-ordinated utilization of all facilities that may be mutually beneficial.

* * * * * * * *

"ARTICLE XIV

"Operating Committee

"Within thirty days after the execution of this agreement Baltimore Company and Holtwood Company shall each appoint one representative to act as its agent for investigation, consultation and advice in all operating, engineering and accounting matters pertaining to this agreement. Each appointment shall be evidenced by written notice to the other party signed by an executive officer. Either party at any time may change its representative or withhold or withdraw from its representative the authority to act for it in any matters specified in the notice, provided that it designate in such notice other representation in respect to such matters. These representatives, to be known as the Operating Committee, shall confer upon request of either; in case of their inability to agree, the question in dispute shall be submitted to the Presidents of the respective companies for their decision."

With regard to the first sentence of Article III(a), it is apparent that it does not restrict Safe Harbor from installing any used and useful additional machinery and equipment which it, and its directors, see fit to install. Safe Harbor has done so (R. 147-148). The provision merely *requires* Safe Harbor to *expand* its plant when both its owners and customers properly and reasonably request it to do so. It does not permit them to force Safe Harbor to install uneconomic additional machinery and equipment or such as would be detrimental to Safe Harbor. If they attempted to do so, they would thereby

commit a breach of Article IV of the Agreement, which expressly requires their cooperation for the installation of the most economical and efficient facilities. In such event, Safe Harbor could refuse to accede to their request, or exercise its independent contractual right to invoke arbitration. Furthermore, any such attempt would be frustrated by the Federal Power Commission. As a licensee under the Federal Power Act, Safe Harbor must obtain the Federal Power Commission's prior approval in order to install any additions which exceed 100 horsepower. (See U. S. C. A., Title 16, sec. 803(b).)

With regard to the second sentence of Article III(a), it must be realized, as we show below, that it has at all times been an academic provision. This is so, because, on account of physical limitations, *there never has been, and will likely never be, any output from additions* to Safe Harbor's initial seven-generator plant. Furthermore, since the amendment to this provision (hereinafter described), which was effected by the order of the Federal Power Commission dated November 4, 1946, any output which may come from hypothetical additions to Safe Harbor's plant stands on the same footing as output from its initial plant. Penn Water and Consolidated have been obligated to pay for such additional output and will be the purchasers thereof, if it can be produced. For the same reason, Safe Harbor has not been deprived of any economic incentive to install productive additions. It will be entitled to the same pecuniary return from Penn Water and Consolidated on the cost thereof as on the cost of its initial plant.

With regard to the last sentence of Article IV, it is apparent that, by its express terms, it does not prevent Safe Harbor from making all separate contractual arrangements with either Penn Water or Consolidated. This provision, to be properly judged on its face, must be read in its context in Article IV. As so read, it does not forbid all such side agreements, but only those which would work against the obligations of the parties expressed in Article

IV to cooperate for the greatest economy and efficiency. This is the meaning of the limiting words "For this purpose" with which the sentence begins and which link and confine it to the rest of Article IV.

With regard to Article XIV, it is apparent from its terms that the Operating Committee for which it provides has no powers whatever to *bind* Safe Harbor or either of the other parties. The fact that Safe Harbor is not even represented on this Operating Committee shows that Safe Harbor's decisions are not to be affected. But, more importantly, the functions and powers of the Operating Committee are expressly limited to "investigation, consultation and *advice* in all operating, engineering and accounting matters pertaining to this agreement." The Committee has never attempted to do anything else.

The record facts also show that there was no "close connection" or interdependence between the Safe Harbor Agreement and the "Penn Water Contract", which the Fourth Circuit earlier held invalid on its face solely because it contained certain provisions relating exclusively to the activities of Penn Water, which provisions do not appear in the Safe Harbor Agreement and were completely different in character and effect from any of the terms of the Safe Harbor Agreement. See *Pennsylvania Water and Power Co. v. Consolidated Gas Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950). The two contracts were contemporaneous and they were each separate and independent implementations of the lawful interstate power pool. But there their supposed "connection" ended. The Penn Water Contract had nothing to do with the activities or operations of Safe Harbor or with Safe Harbor's energy in the hands of Safe Harbor. The execution and operation of neither contract were dependent on the execution and operation of the other. Both could be, and have been, separately performed. Since the decision invalidating the Penn Water Contract, the Safe Harbor Contract has been fully and satisfactorily performed (R. 153-4).

(c) *Safe Harbor Could Not and Would Not Have Been Built Without Cooperation Between Penn Water and Consolidated and Without the Safe Harbor Agreement.*

In the late 1920's Penn Water conceived the idea of developing, by the construction of a new hydroelectric plant, the then unused and wasted water power resources of the Susequehanna River at Safe Harbor located some eight miles above Penn Water's own plant at Holtwood, Pa. Penn Water acquired certain land and flowage rights at this site, made preliminary investigations and plans for the project, and caused Safe Harbor to be incorporated as a Pennsylvania corporation[4] (R. 126-129). The economic utilization of the available water power required an investment of $30,000,000. Penn Water, acting alone, could neither finance a project of that magnitude nor provide a market for the large but unpredictably fluctuating output therefrom (R. 126-131).[5] If the Safe Harbor project was

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[4] Safe Harbor was formed on January 6, 1930, by the merger of two predecessor companies. But these predecessor companies had been incorporated by Penn Water immediately prior thereto in 1929 and had never operated or held franchises to operate. Penn Water and Consolidated *created* the wholly new business of Safe Harbor. They did not *acquire* from others a pre-existing going business, and then engross that business by turning it over to their jointly-owned subsidiary.

[5] The installed capacity of Safe Harbor's seven-generator plant is 230,000 kw., but the amount of output in kwh., dependent entirely upon the fluctuating flow of the Susquehanna River, varies widely and unpredictably as between years, season of the year, days and hours of the day. The flow of the Susquehanna varies from as much as 860,000 cu. ft. per second to as little as a seven-day average of 2,100 cu. ft. per second, a variation factor of 410 to 1. Safe Harbor, lacking any steam-generating plant and any charter or franchise rights to install such plant, can generate "around the clock" energy of less than 5% of its installed capacity. Furthermore, Safe Harbor's dam, the size of which is limited, cannot impound sufficient water to overcome

to be built, it was absolutely necessary for Penn Water and another established electric utility company, with large resources and distribution territory, to cooperate as partners or joint adventurers in the creative enterprise (R. 119, 131). Penn Water made several unsuccessful attempts to interest certain other electric utility companies in the project before approaching Consolidated for this purpose (R. 126, 128).

A long-term contract, such as the Safe Harbor Agreement, for the sale of all its hydro energy was absolutely essential to the creation of Safe Harbor (R. 131). Its widely fluctuating and unpredictable output could not be marketed directly to consumers and could not then be readily marketed even to electric utilities for resale. The bonds of Safe Harbor necessary for its financing could not have been advantageously sold without the assurance of a future market provided by a long-term contract (R. 130, 131). Consolidated could not have been induced to assume the risk entailed in the large investment it was called upon to make in such a new undertaking (R. 129, 130) and in costly installations at Baltimore in order to accommodate this hydroelectric output, without the assurance, by a long-term contract, that it would be entitled in the future to a commensurate share of Safe Harbor's output.

Upon the assurance that such a contract would be made, Consolidated advanced $9,600,000 to Safe Harbor on its

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this inconstant feature. Safe Harbor is a "run of the river" plant. Before its energy can be used by consumers, it is absolutely necessary that it be "firmed up" by steam electric generation, which Safe Harbor does not possess. Nevertheless, electric energy cannot be stored but must be marketed and used the instant it is produced. Hence, Safe Harbor's undependable output cannot be marketed directly to consumers or to any electric utility which lacks sufficient steam generation to firm it up. By its very nature, Safe Harbor's output must be sold to and utilized in an interstate power pool (R. 149-50). See also the findings on this point by the Court of Appeals quoted in footnote 3, *supra*.

unsecured notes for construction prior to financing. Consolidated provided two-thirds and Penn Water one-third of Safe Harbor's equity capital of $9,000,000, and Consolidated became the primary guarantor of all of Safe Harbor's $21,000,000 of bonds. Penn Water received one-half of Safe Harbor's voting stock. Consolidated received one-half of Safe Harbor's voting stock and an equivalent amount of Safe Harbor's non-voting stock. (R. 131-2).

Thus, without the cooperation of Penn Water and Consolidated in this creative joint adventure and without the Safe Harbor Agreement, or an agreement substantially like it, the Safe Harbor project could not, and would not, have been built (R. 131). A great natural resource would have continued going to waste.

The Safe Harbor Agreement created and called into being a *wholly new business,* which had never been in other hands or in pre-existing competition with anyone. Its whole purpose and effect was to augment and expand supply to the full potentiality of the Susquehanna River and not to curtail or suppress it (R. 124, 126, 147-8).

(d) *Safe Harbor Physically Cannot Produce Any Energy in Addition to the Output of its Seven-Generator Plant.*

The average flow of the Susquehanna River was, and is, able to provide water power sufficient to operate seven generators, each of 42,500 horsepower, *and no more.* Seven such generators will exhaust the entire flow of the Susquehanna River up to 65,000 cu. ft. per second. River flow in excess of that amount will occur on the average on only 54 days in the year, and these days will be unpredictably scattered throughout the year (R. 141, 142). Hence the plan *from the very beginning* was to construct a plant which would consist of seven, and only seven, such generators (R. 141, 142, 143, 146). Safe Harbor's powerhouse was constructed to provide space for only these seven contemplated generators (R. 146). The first six generators were

installed as the "initial development" during the years 1931—1934, but the parties, as early as 1931, committed themselves to the Pennsylvania Railroad to install the seventh and last generator, to produce 25-cycle energy, upon eighteen months' notice from the Railroad that its output would be needed for the railroad electrification (R. 161). Pursuant to this commitment, this seventh and last generator was installed in 1940.

Affidavits filed in answer to the motion for summary judgment set forth uncontradicted facts demonstrating that the generating capacity of Safe Harbor cannot feasibly or economicably be increased or expanded by any generating additions to plant.

(e) *Safe Harbor's State Charter and Franchise Powers and the Character of its Product Rendered it Unable to Compete.*

By its incorporation Safe Harbor acquired the state-conferred statutory right to generate *hydroelectric energy only* and to sell the same only to such persons and at such places as the Pennsylvania Public Service Commission should permit.[6] In Safe Harbor's application to that Commission, presented in the early part of 1930 for a Certificate of Public Convenience to begin the exercise of its charter powers, and at the hearing thereon, the Pennsylvania Commission was fully informed of the plan which Penn Water and Consolidated had formed for the Safe Harbor develop-

[6] Safe Harbor obtained charter rights limited to "the supply, storage or transportation of water and waterpower for commercial and manufacturing purposes" in two rural Pennylvania townships at the project site (R. 133, 134, 135, 150). Its powers were enlarged to those stated above, by Pennsylvania statutes of general application to such companies (Act of July 2, 1895, P. L. 425, as amended by Act of May 7, 1929, P. L. 1632). Safe Harbor never acquired charter or franchise rights to own or operate a steam-electric generating plant or to own or operate transmission lines for the delivery of its product, or to serve any distribution territory whatever (R. 133, 134, 135, 152).

ment and specifically informed: (1) that Penn Water and Consolidated would control Safe Harbor by stock ownership, (2) that they would be the exclusive customers for Safe Harbor's entire output under a long-term contract, and (3) that Penn Water would undertake to transmit and deliver to Consolidated in Maryland Consolidated's share of Safe Harbor's energy, and for that purpose would install additional transmission lines.

With this information before it, the Pennsylvania Commission approved the Safe Harbor plan and project as in the public interest, but, by the Certificate of Public Convenience which it issued on March 31, 1930, this Commission *expressly forbade Safe Harbor to sell its output to anyone except Penn Water and Consolidated* (R. 168-169). The Certificate also expressly prevented Penn Water from reselling its share of Safe Harbor's output except to certain named electric utilities. Thus, before Safe Harbor began operations and before the Safe Harbor Agreement was executed, the Pennsylvania Commission took care to prevent any competition between Safe Harbor and any other electric generating company. Since Safe Harbor was (to the extent such Pennsylvania law could validly apply) legally prevented at the beginning from selling its product to anyone except its two parent companies, without later permission of this Commission, there was no possibility at that time that Safe Harbor *itself* would or should compete with anyone, or that its product would or should compete with the product of others, until, of course, after it should come into the hands of Penn Water and Consolidated as purchasers. As stated in the opinion of the Court of Appeals "these two utilities are its only customers under an arrangement approved by the Pennsylvania Commission" (R. 234).

Safe Harbor's widely fluctuating output of unfirm hydroelectric energy (described in footnote 5, *supra*) could not physically or economically compete in any market with the "firmed up" energy of Penn Water, Consolidated or any

other electric generating utility in the vicinity of Safe Harbor (R. 149). Therefore, Safe Harbor not only had no product of the character which could compete with marketable firmed up energy, and no transmission lines (or franchise powers to own and operate transmission lines) in order to deliver it to a general market, but it was precluded from entering any competitive market, even if it could physically, practically and economically have done so, by the said order of the Pennsylvania authorities.

Notwithstanding the *contested* issues with regard to Safe Harbor's ability and obligation to compete with its creators (alleged by Penn Water, R. 14, 15; denied by Consolidated in its answer, R. 48, and affidavit, R. 124-5, 129-146, 149-152), the Court of Appeals purported to find as a fact, *in this summary judgment proceeding,* that, were it not for the Safe Harbor Agreement, "Safe Harbor would be a potential competitor" in the electric distribution business (R. 237). The Court of Appeals rested this finding wholly upon the two facts that Safe Harbor's plant is "so located as to furnish power to customers in Pennsylvania and elsewhere, and that in fact its product is delivered over the lines of Pennsylvania Water to various utilities in Pennsylvania, Maryland and the District of Columbia" (R. 237). It is submitted that these two facts do not even tend to support the conclusion of the Court of Appeals that Safe Harbor is in potential competition with anyone. And certainly there is no legal requirement under the Sherman Act for parent companies to compete with their wholly-owned subsidiary supplier, when the business of the subsidiary is *a wholly new one* which they created and did not acquire from others and which had never been in actual or potential competition with anyone before.

Inability to produce anything but a limited amount of fluctuating hydroelectric energy, inability to increase its output by any generating additions to plant over the output of its seven generators, inability to operate transmission lines, and inability to sell its product to anyone except

its parent companies were the *birthmarks* of Safe Harbor, impressed upon it, not by the Safe Harbor Agreement, but by nature and by law.

(f) *The Approval of the Safe Harbor Agreement by the Pennsylvania Commission.*

We have just recited the Pennsylvania Commission's approval, by the issuance of the Certificate of Public Convenience, of the conditions which became the salient features of the Safe Harbor Agreement when it was later executed on June 1, 1931. The Safe Harbor Agreement itself was filed by Safe Harbor with the Pennsylvania Commission as early as September 17, 1933, in compliance with a General Order of that Commission.[7] It has not been disapproved by the Pennsylvania Commission, and *an issue of fact* exists in this case as to whether it has been affirmatively approved by that agency, if that fact is legally material. Penn Water alleged that it had not been so approved (R. 26). Consolidated and the Public Service Commission of Maryland denied this allegation (R. 55, 181). Penn Water's affidavit on the point is limited to the fact that no formal "order" of the Commission approving it has been entered (R. 79). The Pennsylvania Commission itself, though a party to this case and the best source of information on this point, filed no affidavit on the subject.

(g) *The Relationship of the Federal Power Act and the Federal Power Commission to the Safe Harbor Agreement.*

On April 22, 1930, Safe Harbor acquired a license for its project from the Federal Power Commission, and there-

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[7] The Middle District of Pennsylvania has recently held that Safe Harbor sells all of its output to Penn Water and Consolidated by the terms of the Safe Harbor Agreement and that the Pennsylvania Public Utility Commission has no jurisdiction whatever over Safe Harbor's rates. See *Consolidated Gas Electric Light and Power Co. v. Siggins, et al.*, 99 F. Supp. 151 (1951).

after *all* of its rights and duties, as an interstate public utility on navigable water, emanated from such federal license.[8] The license *completely* covered *all* of Safe Harbor's activities. Safe Harbor has done nothing except what the Federal Government has licensed it to do. The Safe Harbor Agreement is one for a licensed interstate sale, for resale, of energy *from* a licensed project, and all of its provisions are incidental to, and part of, such licensed interstate sale. Section 8 of the Federal Power Act (U.S.C. A., Title 16, Sec. 801) provides:

> "No voluntary *transfer* of any license, or *of the rights thereunder granted,* shall be made without the written approval of the commission * * *."

Art. 25 of Safe Harbor's license provided that none of Safe Harbor's "franchises" or "rights of occupancy and use", which must include sale, could be voluntarily "transferred" to another without the approval of the Federal Power Commission. Thus, Congress and its agency has thereby pre-empted, and excluded the State of Pennsylvania from, the field of permitting Safe Harbor to transfer any of its rights and franchises. This has rendered the statute of Pennsylvania set forth in footnote 2, *supra,* completely inapplicable as a matter of law, even if the Safe Harbor Agreement could be construed, as we submit it cannot be, to effect a transfer of Safe Harbor's franchises and powers within the meaning of that Pennsylvania statute.

Since August 26, 1935, the effective date of Part II of the Federal Power Act (U.S.C.A., Title 16, Secs. 824-824h),

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[8] By Sec. 4 of the Federal Power Act (U. S. C. A., Title 16, Sec. 797) the Federal Power Commission is authorized to issue licenses expressly covering the "operating" of powerhouses on, and the "utilization of power * * * *from* * * * any of the streams or other bodies of water over which Congress has jurisdiction". Safe Harbor's license in terms permitted it to construct, operate and maintain its hydroelectric plant and to utilize (and therefore sell) power *from* the Susquehanna River.

Safe Harbor has also been a "public utility", subject to the plenary and immediate jurisdiction of the Federal Power Commission over all of its facilities and over all of its interstate rates, services and "contracts" relating thereto, including the Safe Harbor Agreement. The Safe Harbor Agreement in its entirety has been, and is, Safe Harbor's tariff of rates and services on file with the Federal Power Commission.

As the result of a plenary investigation begun September 1, 1944, and concluded November 4, 1946, the Federal Power Commission exercised its jurisdiction, under both Parts of the Federal Power Act, over the Safe Harbor Agreement as a filed tariff, and, in its opinion and order, reciting that the Safe Harbor Agreement was "the subject of this proceeding", found that all of Safe Harbor's sales were in interstate commerce to Penn Water and Consolidated, at wholesale for resale. After modifying the original Safe Harbor Agreement in two respects only, the Commission *required* Safe Harbor to file the entire Safe Harbor Agreement, as so revised, as its schedule of rates and charges effective January 1, 1947 (R. 115). This order bound not only Safe Harbor but Penn Water as well, because Penn Water made itself a privy by having its own counsel appear for Safe Harbor in the proceedings and by controlling this litigation in which Penn Water had an important financial interest (R. 65). On review, this order was affirmed by the Third Circuit in an opinion which announced that "Safe Harbor's contracts for power and its backing by the Pennsylvania and Maryland Companies are exemplary." See *Safe Harbor Water Power Corporation v. Federal Power Commission*, 179 F. 2d 179, 199 (1949), cert. den. 339 U. S. 957.

The said order of the Federal Power Commission modified the original Safe Harbor Agreement only to the extent of (1) lowering the pecuniary rates of Safe Harbor charged under Article V of the Agreement from rates providing a 7% return to rates providing a 5% return, and (2) pro-

viding, in effect, that, if there should be any output from any additions Safe Harbor might make to its plant, such output also would be sold to Penn Water and Consolidated on the same terms as the output from Safe Harbor's initial seven-generator plant,—in other words, that the same fair return of 5% would automatically in the future "be charged to Safe Harbor's two customers", Penn Water and Consolidated, upon Safe Harbor's investment in used and useful additions to plant. The order thereby effected an amendment to the last sentence of Article III (a) of the Agreement, which had originally provided that any such output from such hypothetical additions, except as otherwise required by law, should not be sold to others without the consent of Penn Water and Consolidated.

Although, by reason of waterpower limitations, Safe Harbor is physically unable to install additional generators or to generate additional output from additions to plant, it has from time to time, freely and upon its own initiative, installed substantial plant improvements and additions costing thousands of dollars. It has had every incentive to do so, because Penn Water and Consolidated have paid Safe Harbor the same pecuniary rate upon such investments as upon its investment in the initial plant. Since the above amendment to the Safe Harbor Agreement, Penn Water and Consolidated are clearly the contract purchasers of the output from such additions, if additional generating facilities can ever become feasible.

Except for these modifications, the Commission's order left the rest of the Safe Harbor Agreement, including Articles III(a), IV (last sentence) and XIV, completely untouched and approved. The Federal Power Commission, which attempted to intervene as a party in the present case before the Fourth Circuit, formally represented to the Court of Appeals in the present case that its said order of November 4, 1946, constituted an approval by the Commission of the Safe Harbor Agreement as so modified, including approval, as appropriate to the interstate power

pool, of the very provisions thereof which the Court of Appeals has found objectionable.

QUESTIONS PRESENTED

In the light of the foregoing Statement, the Questions Presented are six in number. They are:

1. Did the District Court and the Court of Appeals in this case have jurisdiction to declare the Safe Harbor Agreement invalid, as violative of the Sherman Act and laws of Pennsylvania, or was *primary* jurisdiction with regard to the validity of the Safe Harbor Agreement, as the filed and prescribed interstate tariff of a federal licensee, vested in the Federal Power Commission by the provisions of the Federal Power Act?

2. Assuming the jurisdiction of the Court of Appeals, was it reversible error for it to strike down the Safe Harbor Agreement as *per se* invalid on its face, *by summary judgment,* notwithstanding the record presented numerous uncontradicted facts, and genuine issues as to material facts, tending to show the reasonable and lawful nature, interpretation, purpose, operation and effect of the Safe Harbor Agreement, and its compliance with the Rule of Reason, including its approval, as reasonable and in the public interest, by state and Federal regulatory authorities and its compliance with constitutionally applicable state and Federal law?

3. Is the Safe Harbor Agreement invalid on its face, as *per se* in violation of the Sherman Act, because it contained the provisions set forth in Article III(a), IV (last sentence) and XIV thereof, which separable provisions, properly interpreted, merely (a) required Safe Harbor to install additional machinery and equipment in response to reasonable requests of its two creators, owners and customers; (b) prevented Safe Harbor from making only such side agreements with either of its two creators, owners and

customers as would work against the efficiency and economy of the joint undertaking, and (c) set up an Operating Committee with powers and functions limited to "investigation, consultation and advice in all operating, engineering and accounting matters pertaining to this agreement"?

4. Is the Safe Harbor Agreement invalid on its face as *per se* in violation of the Sherman Act, simply because it was entered into contemporaneously with a separate, distinct and independent contract between two of the parties to the Safe Harbor Agreement (i.e., the "Penn Water Contract" held illegal, erroneously we believe, in *Pennsylvania Water and Power Co.* v. *Consolidated Gas Electric Light and Power Co.*, 184 F. 2d 552 (C. A. 4, 1950)), and because each of these contracts separately constituted an implementation of a lawful underlying purpose to create a regulated economic and efficient electric power pool for an interstate region necessary for the utilization of large quantities of fluctuating hydroelectric energy?

5. Is the Safe Harbor Agreement invalid on its face as *per se* contravening a statute of Pennsylvania (*supra*, note 2) requiring approval by the Pennsylvania Commission of a "transfer" by a public utility of that State of its powers and franchises, notwithstanding (a) the Safe Harbor Agreement provides for no such "transfer", (b) the record contains genuine issues of fact that the Agreement has not so operated and that it has been approved by the Pennsylvania Commission, and (c) any state requirement of approval of such "transfer" by the Pennsylvania Commission is constitutionally inapplicable to Safe Harbor, a licensee under the Federal Power Act, by reason of Sec. 8 of that Act (U. S. C. A., Title 16, Sec. 801), which confers the powers to approve such transfer exclusively upon the Federal Power Commission?

6. Is the Safe Harbor Agreement invalid on its face as *per se* contravening the public policy and common law of Pennsylvania (including the state law of *ultra vires*), not-

withstanding (a) the constitutional inapplicability of such state law to the Safe Harbor Agreement, which complies with the paramount public policy of Congress as expressed in the Sherman Act and the Federal Power Act, (b) the fact that the Safe Harbor Agreement does not provide any surrender by Safe Harbor to others of its initiative as a public utility (and the initiative of its directors), to conduct its operations, to expand its plant and activities, and to apply to any governmental authorities having jurisdiction to increase its corporate or franchise powers, or to regulate its rates, operations and services, and (c) the genuine issue of fact that the Safe Harbor Agreement has not operated to effect such surrender?

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals that the Federal Power Commission lacked primary jurisdiction over the Safe Harbor Agreement and that said Agreement is open to collateral attack in this case *conflicts* with the decision on the same matter of the District of Columbia Circuit in *Pennsylvania Water and Power Co., et al. v. Federal Power Commission, et al.*, decided July 3, 1951, *cert. granted* February 4, 1952. Effective review of the last mentioned case by this Court requires consideration by this Court of the instant case.

The Court of Appeals in the instant case stated that its decision on this point conflicts with the said decision of the District of Columbia Circuit (R. 245).

2. The decision of the Court of Appeals that the Safe Harbor Agreement is invalid on its face as *per se* in violation of the Sherman Act *conflicts* with an alternative ground of decision and reasoning on the same matter of the District of Columbia Circuit in *Pennsylvania Water and Power Co., et al. v. Federal Power Commission, et al.*, decided July 3, 1951, *cert. granted* February 4, 1952.

Since the other alternative ground of the District of Columbia Circuit's decision was that the question of va-

lidity under the Sherman Act was not timely raised before the Federal Power Commission, this Court reviewing that decision may not be required to reach the Sherman Act point. The instant case, and this petition for review of it, directly raise the question of the validity of the Safe Harbor Agreement under the Sherman Act.

3. The decision of the Court of Appeals *conflicts* with the decision and order of the Federal Power Commission, dated November 4, 1946 (5 F.P.C. 221, 265), modifying and approving the Safe Harbor Agreement and ordering the same to be filed and observed by Safe Harbor as its filed tariff; and *conflicts* with the decision of the Third Circuit affirming said order of the Federal Power Commission in *Safe Harbor Water Power Corporation v. Federal Power Commission,* 179 F. 2d 179 (C. A. 3, 1949), cert. den. 339 U. S. 957.

4. The Court of Appeals in this case has decided the following important questions of Federal law in a way *conflicting* with applicable decisions of this Court:

(a) The holding that the Federal Power Commission lacks primary jurisdiction over the question of the validity of the Safe Harbor Agreement *conflicts* with the provisions of the Federal Power Act, which expressly empower the Commission to determine and fix by order just and reasonable contracts and contractual arrangements between public utilities which affect their rates and services and to authorize changes therein, and requires the Commission in so doing to apply Sherman Act standards appropriate to this specialized field (made so adaptable by the Rule of Reason).[9] This holding also *conflicts* with *U. S.*

[9] U. S. C. A. Title 16, Sec. 803(h) prohibits, as a condition of the license, contracts made by "licensees" in unlawful restraint of trade, and thereby makes such restraints a violation of the Federal Power Act as well as of the Sherman Act. Sec. 825h

Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474 (1932) and with *Terminal Warehouse Co. v. Pennsylvania R. Co.*,. 297 U. S. 500 (1936). The cases of *U. S. v. Borden Co.*, 308 U. S. 188 (1939) and *U. S. Alkali Association v. U. S.*, 325 U. S. 196 (1945) are inapplicable. They were suits by the Attorney General and not by private parties. A combination which included parties and subject matter not subject to the jurisdiction of the Secretary of Agriculture was involved in the *Borden Co.* case, and the powers of the Federal Trade Commission involved in the *Alkali Association* case were merely investigatory.

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thereof empowers the Federal Power Commission by order to enforce the provisions of the Act. Sec. 825*l* provides the exclusive method by which such orders of the Commission may be reviewed by the Courts of Appeals. Sec. 824a (b) authorizes the Commission to require a "public utility", if its generating facilities and output are sufficient for the purpose, to establish physical connections with, and make sales of energy to, other electric companies and to *"prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."* Sec. 824d requires "all *contracts* which in any manner affect or relate to such rates, charges, classifications and services" for interstate sales by public utilities of energy at wholesale to be filed with the Commission, and prohibits *any changes* in such contracts until after thirty days' notice to the Commission and the public. Sec. 824e empowers the Commission, if it finds that any rate, charge or classification in such sale, or any *"contract affecting* such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential", to *"determine* the just and reasonable * * * *contract* to be *thereafter observed and in force"* and to *"fix the same by order"*. Sec. 824f empowers the Commission, in case any interstate service of a public utility is inadequate, to determine the proper service to be rendered and to "fix the same by its order". Sec. 801 provides that "no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission".

The decision of *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945) relied on by the Court of Appeals has, we submit, been misinterpreted and misapplied. That decision permitted a suit challenging an alleged underlying conspiracy of common carriers but expressly permitted no collateral court attack upon a rate tariff under the jurisdiction of the Interstate Commerce Commission. The present case represents a collateral attack on a public utility's filed tariff itself.

(b) The holding that the Safe Harbor Agreement can be adjudged illegal by *summary judgment*, notwithstanding the Record contains genuine issues as to facts material (1) to its validity, (2) to its separability from the Penn Water Contract and (3) to the separability of the invalidated secondary and academic provisions of the Safe Harbor Agreement from its valid primary provisions, *conflicts* with the decisions of this Court hereinafter cited requiring application of the Rule of Reason to all restraints except those which effect price fixing, monopoly, boycott, or the exclusion of competitors from a market, and constitutes a direct violation of Rule 56 of the Federal Rules of Civil Procedure. It conflicts with *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944) and *Arenas v. U. S.*, 332 U. S.. 419 (1944). See also as to separability, A. L. I. Rest. Contracts sec. 603 and comment a. In so disregarding this Rule, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision" (Rule 38, Supreme Court Rules).

(c) The holding that the Safe Harbor Agreement can be adjudged illegal on its face as *per se* in violation of the Sherman Act, and without a determination of its reasonableness under the factual criteria of the

Rule of Reason, conflicts with *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911); *Board of Trade of Chicago v. U. S.*, 246 U. S. 231 (1918); *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 728-9 (1944), (exclusive dealing arrangement); *U. S. v. Yellow Cab Co.*, 332 U. S. 218 (1947), 338 U. S. 338 (1949), (vertical and horizontal integration); *U. S. v. Columbia Steel Co.*, 334 U. S. 495 (1948) (horizontal integration); *U. S. v. Paramount Pictures*, 334 U. S. 131, 173-4 (1948), (vertical integration by stock control and ancillary contracts).

The Sherman Act requires the application of a standard and is not an unqualified prohibition like that contained in Sec. 3 of the Clayton Act. See *Standard Oil Co. of California v. U. S.*, 337 U. S.. 293, at 311-313 (1949).

The fact that the Safe Harbor Agreement was subject to regulation by the Federal Power Commission and that it has been regulated, approved, and its observance ordered by that Commission argues strongly that it complies with the Rule of Reason. If the Rule of Reason is observed and applied in this case, the Sherman Act and the Federal Power Act, and the underlying policies of the two enactments, can be read together and accommodated. The statutory standard of the Federal Power Act is reasonableness. "Just and reasonable" rates, services and contracts of licensees and public utilities subject thereto are the objectives of that Act. Such is also the statutory standard which has been read into the Sherman Act. The Federal Power Commission, in administering the Federal Power Act, must observe and apply Sherman Act standards and give them the limited application appropriate to this field; and, since this is so, when it has applied the standards of reasonableness and public interest to the Safe Harbor Agreement and has found it to comply with those standards, such determination should be held extremely relevant and material upon the question of its compliance with the Rule of Reason.

It is by no means certain that the District Court or the Court of Appeals held that the Safe Harbor Agreement constituted price fixing. The opinions of the lower Courts did not say so. Any assumption that they did so hold must rest upon the reliance which these Courts placed upon *Pennsylvania Water and Power Co. v. Consolidated Gas Electric Light and Power Co.*, 184 F. 2d 552 (C. A. 4, 1950). That case held that price fixing was effected by the totally different provisions of the Penn Water Contract, which do not appear in the Safe Harbor Agreement and which provided for sales by Penn Water of certain of its product to outsiders and gave Consolidated a controlling and veto power over any such sales which Penn Water might make. The terms of the Safe Harbor Agreement, particularly after the amendment thereto resulting from the Federal Power Commission's Order of November 4, 1946, whereby Penn Water and Consolidated purchase *all* of Safe Harbor's output—including not only the output from its initial plant, but also any hypothetical output there may be from additions to plant,—makes erroneous and unsound any holding that the Safe Harbor Agreement fixed Safe Harbor's prices to others. Under the Safe Harbor Agreement, as amended, there could be no sales by Safe Harbor to others, the prices of which could be fixed.

The finding of the Court of Appeals that Safe Harbor is in potential competition with Penn Water and Consolidated, notwithstanding the record facts heretofore set forth in Section (e) of the Statement in this Petition, *conflicts* with *U. S. v. Yellow Cab Co.*, 332 U. S. 218, 229 (1947), holding that concerns are not in potential competition within the meaning of the Sherman Act if such competition is "impractical and unlikely". Such finding of potential competition is also completely inconsistent with the implied holding of the Court of Appeals that the provisions of the Safe Harbor Agreement, whereby Penn Water and Consolidated purchased Safe Harbor's entire output, if such provisions stood alone, are entirely legal as creat-

ing Penn Water's "rightful entitlement" and Consolidated's "rightful entitlement". This is so, because Penn Water and Consolidated's lawful purchase of Safe Harbor's entire output would, in and of itself, prevent Safe Harbor's competition with them, if otherwise possible.

Furthermore, the proposition, which the Court of Appeals apparently subscribed to, that the Sherman Act requires competition between parent companies, on the one hand, and, on the other, a *wholly new business* of their subsidiary, which wholly new business these parent companies *created* and did not acquire from others, and which had never before been in competition with anyone, *is a proposition which has never been sanctioned by any decision of this Court.* All of the decisions of this Court holding illegal the elimination of competition between affiliated companies were rendered in cases in which the business of such affiliates had formerly been in independent competing hands and their acquisition and subsequent affiliation suppressed such *pre-existing competition.* These cases are: *Northern Securities Co. v. U. S.,* 193 U. S. 197 (1904); *U. S. v. Terminal Railroad Association of St. Louis,* 224 U. S. 383 (1912); *U. S. v. Reading Co.,* 253 U. S. 26 (1920); *U. S. v. Crescent Amusement Co.,* 323 U. S. 173 (1944) and *Timken Roller Bearing Co. v. U. S.,* 341 U. S. 593 (1951). See also *U. S. v. Yellow Cab Co.,* 332 U. S. 218 (1947), 338 U. S. 338 (1949) and *U. S. v. Columbia Steel Co.,* 334 U. S. 495 (1948).

In the *Timken* case, *supra,* British Timken had long been in pre-existing competition with American Timken before their affiliation, and their newly created subsidiary, French Timken, *acquired* trademark rights in France which had been in independent competing hands.

In *Keifer--Stewart v. Seagram & Sons, Inc.,* 340 U. S. 211 (1951) there was no holding that a parent corporation and its wholly owned subsidiary must compete with each other. The decision was that such affiliates could not lawfully conspire to eliminate competition from *independent*

wholesalers and to fix such independent wholesalers' resale prices.

In *U. S. v. Griffith*, 334 U. S. 100 (1948), and *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948), and *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), a group of affiliated companies used conspiracy and group monopoly powers to defeat *competition offered the group from outside theatres.* No competition *between* parent and subsidiary corporations was required by these decisions.

(d) The holding that the Safe Harbor Agreement is illegal on its face as *per se* in violation of local laws and public policy of Pennsylvania, notwithstanding (1) that the Agreement in its entirety constitutes a contract subject to the Federal Power Act, (2) that it constitutes, in its entirety, a tariff prescribed by the Federal Power Commission, and (3) that any transfer of Safe Harbor's rights under its Federal license is governed by Sec. 8 of the Federal Power Act, erroneously gives unconstitutional effect to local State law which has been rendered inapplicable by the assertion of paramount Federal law and public policy (namely, that contained in the Federal Power Act and the Sherman Act). Such holding violates the Commerce Clause of the Federal Constitution and conflicts with *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927); *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924); *Bush Co. v. Maloy*, 267 U. S. 317 (1925); *Buck v. Kuykendall*, 267 U. S. 307 (1925); *Adams Express Co. v. New York*, 232 U. S. 14 (1914); *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333 (1914); *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911); *Mayor of Vidalia v. McNeely*, 274 U. S. 676 (1927), and *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525 (1949).

Nullification of the Safe Harbor Agreement would destroy the contractual basis for what both Courts below held to be Consolidated's "rightful entitlement" to the eco-

nomical output of the Safe Harbor project. This grave jeopardy to the interstate power pool necessary for a regional district and to the participation of the people of Maryland in the benefits of hydroelectric power from the Susquehanna River, presents a problem of great public significance and importance. Like its conflicting case, now awaiting argument before this Court, this case should be reviewed.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should be granted.

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